KHOO KIM HOCK

v.

MAYBAN FINANCE BHD

COURT OF APPEAL, PUTRAJAYA
SULONG MATJERAIE JCA
JEFFREY TAN JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: J-02-2325-09]
31 JANUARY 2011

CIVIL PROCEDURE: *Service - Out of jurisdiction - Striking out - Appeal for - Whether writ of summons could be extended for a period of more than 12 months - Whether High Court had valid authority to allow writ of summons to be extended 11 times - Whether there was compliance of O. 6 rr. 7(2) & 7(2A) Rules of the High Court 1980 - Responsibility of respondent/plaintiff's lawyers to monitor own case*

The appellant was the sixth defendant in a writ of summons and statement of claim filed by the respondent/plaintiff and was sued as a guarantor in respect of a revolving credit facility granted to the first defendant company. Since the appellant was a resident of Singapore, the respondent/plaintiff filed an *ex parte* summons in chambers on 25 February 2000 applying *inter alia* for leave and liberty to serve the writ of summons out of jurisdiction against the appellant. The Registrar allowed the application. However, attempts at service on the appellant proved unfruitful. It was contended by the respondent that the Johor Bahru High Court Registry had failed to notify the respondent/plaintiff's lawyers of the failed attempts at service. The respondent/plaintiff's lawyers then proceeded to apply *via* summons for an order for extension of the validity of the writ, which was allowed by the registrar who handed down an *ex parte* order on 21 June 2006 renewing the writ by giving eleven extensions of six months each thereby extending the writ by five years and six months. The appellant, however, responded by applying *via* summons that, *inter alia*, the writ and statement of claim against the appellant be struck out with costs. In dismissing the summons by the appellant, it was the view of the judicial commissioner that the respondent/plaintiff's lawyers were kept in the dark as to the outcome of the attempted service of process on the foreign defendant and that there was no

A delay caused by the respondent/plaintiff and even if there were, it was unintentional. The appellant therefore appealed against the said decision of the judicial commissioner. The issues that arose herein were (i) whether the writ of summons could be extended for a period of more than 12 months under the Rules of the High
B Court 1980; (ii) who was responsible to monitor if a writ of summons had lapsed or otherwise when such writ and statement of claim was to be served out of jurisdiction.

Held (allowing the appeal with costs)

C **Per Sulong Matjeraie JCA delivering the judgment of the court:**

(1) Pursuant to O. 6 rr. 7(2) and 7(2A) Rules of the High Court 1980, it was clear that the High Court has the power to extend the validity of the writ of summons twice and not
D exceeding six months at any one time. The other requirement under r. 7(2) is that the application to extend must be made before the expiry of the writ of summons. Herein, the application to extend the validity of the writ of summons dated 25 February 2000 was made *vide* a summons in chambers
E dated 23 February 2006 ('renewal application'). It was two days short of six years from the date of the writ of summons. Yet the High Court allowed the writ of summons to be extended 11 times *ie*, from 25 February 2001 to 24 August 2006 *vide* an order dated 21 June 2006 ('the extension
F order.') (paras 19 & 20)

(2) A reading of O. 6 r. 7 of the Rules of the High Court 1980 showed that firstly the renewal application was not made 'before the expiry of the writ.' It was made on 23 February
G 2006 whereas the writ was dated 25 February 2000. This was contrary to O. 6 r. 7(2A) Rules of the High Court 1980. Previously a writ may be valid for a period of 12 months but after the amendment of the Rules of the High Court 1980, a writ was only valid in the first instance for six months.
H Secondly, the extension order allowed an extension of 11 times whereas under O. 6 r. 7(2) Rules of the High Court 1980 the court could only order the extension of the validity of the writ twice not exceeding six months at any one time beginning with the day next following that on which it would

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otherwise expire. Clearly by extending 11 times the extension order ran foul of O. 6 r. 7(2) Rules of the High Court 1980. (paras 21 & 22)

(3) There was no merit in the argument that the respondent/plaintiff's lawyers were kept in the dark as to the outcome of the attempted service of process on the appellant. The responsibility to find out if the writ had been served laid with the respondent/plaintiff's lawyers. Nothing was adduced herein to show that the respondent/plaintiff's lawyers had taken any step to write to the High Court Johor Bahru enquiring on the progress of the service of the writ. It was unquestionably the responsibility of the respondent/plaintiff's lawyers to monitor their own case. (paras 23 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah defendan keenam di dalam writ saman dan penyataan tuntutan yang difailkan oleh responden/plaintif dan disaman sebagai penjamin berhubungan dengan kemudahan kredit pusingan yang diberi kepada syarikat defendan pertama. Oleh kerana perayu adalah penduduk Singapura, responden/plaintif memfailkan *ex parte* saman-dalam-kamar pada 25 Februari 2000 memohon antara lain untuk kebenaran dan kebebasan untuk menyampaikan writ saman luar bidangkuasa terhadap perayu. Pendaftar telah membenarkan permohonan. Bagaimanapun, percubaan penyerahan pada perayu tidak berhasil. Responden berhujah bahawa pejabat pendaftaran Mahkamah Tinggi Johor Bahru telah gagal memaklumkan kepada peguam-peguam responden/plaintif mengenai percubaan-percubaan penyerahan yang gagal. Peguam-peguam responden/plaintif kemudiannya memohon melalui saman untuk perintah perlanjutan masa keesahan writ, yang telah dibenarkan oleh pendaftar yang dicatatkan sebagai perintah *ex parte* pada 21 Jun 2006 membaharui writ dengan memberi perlanjutan masa sebanyak sebelas kali untuk setiap enam bulan oleh itu melanjutkan writ selama lima tahun enam bulan. Perayu, bagaimanapun, membalas dengan memohon melalui saman bahawa, antara lain, writ dan pernyataan tuntutan terhadap perayu ditolak dengan kos. Dalam menolak saman oleh perayu, ia adalah pandangan pesuruhjaya kehakiman bahawa peguam-peguam responden/plaintif tidak tahu menahu mengenai hasil percubaan penyerahan ke atas defendan luar negara dan tidak terdapat

A kelewatan disebabkan responden/plaintif dan jika adapun, ia tidak disengajakan. Perayu oleh itu merayu terhadap keputusan pesuruhjaya kehakiman tersebut. Isu-isu yang timbul di sini adalah (i) sama ada writ saman boleh dilanjutkan masa bagi tempoh lebih dari 12 bulan di bawah Kaedah-Kaedah Mahkamah Tinggi 1980;
B (ii) pihak mana yang bertanggungjawab mengawasi jika writ saman telah luput atau sebaliknya apabila writ dan pernyataan tuntutan disampaikan luar bidangkuasa.

Diputuskan (membenarkan rayuan dengan kos)
C **Oleh Sulong Matjeraie HMR menyampaikan penghakiman mahkamah:**

(1) Di bawah A. 6 k. 7(2) dan 7(2A) Kaedah-kaedah Mahkamah Tinggi 1980, ia adalah jelas bahawa Mahkamah Tinggi mempunyai kuasa untuk melanjutkan keesahan writ saman dua
D kali dan tidak melebihi enam bulan pada setiap satu masa. Keperluan yang lain di bawah A. 7(2) adalah permohonan untuk perlanjutan masa mesti dibuat sebelum writ saman luput. Di sini, permohonan untuk melanjutkan keesahan writ saman bertarikh 25 Februari 2000 dibuat melalui saman dalam kamar
E bertarikh 23 Februari 2006 ('permohonan pembaharuan'). Ia adalah dua hari sebelum enam tahun dari tarikh writ saman. Tetapi Mahkamah Tinggi membenarkan writ saman dilanjutkan sebelas kali iaitu dari 25 Februari 2001 ke 24 Ogos 2006 melalui perintah bertarikh 21 Jun 2006 ('perintah perlanjutan
F masa').

(2) Satu bacaan A. 6 k. 7 Kaedah-Kaedah Mahkamah Tinggi 1980 menunjukkan bahawa permohonan pembaharuan tidak dibuat 'sebelum tamat tempoh writ'. Ia dibuat pada
G 23 Februari 2006 manakala writ bertarikh 25 Februari 2000. Ini bertentangan dengan A. 6 k. 7(2A) Kaedah-Kaedah Mahkamah Tinggi 1980. Sebelum ini writ adalah sah untuk tempoh 12 bulan tetapi selepas pindaan Kaedah-Kaedah Mahkamah Tinggi 1980, writ hanya sah selama enam bulan.
H Seterusnya, perintah perlanjutan masa membenarkan perlanjutan masa sebelas kali manakala di bawah A. 6 k. 7(2) Kaedah-Kaedah Mahkamah Tinggi 1980 mahkamah hanya boleh memerintah perlanjutan masa keesahan writ dua kali dan

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tidak melebihi enam bulan pada setiap satu masa bermula dengan hari selepas hari luput. Jelas sekali dengan perlanjutan masa sebelas kali perintah perlanjutan masa telah melanggari A. 6 k. 7(2) Kaedah-Kaedah Mahkamah Tinggi 1980.

(3) Tiada merit di dalam hujahan peguam-peguam responden/plaintif bahawa mereka tidak tahu menahu mengenai hasil percubaan proses penyerahan ke atas perayu. Tanggungjawab untuk mengetahui sama ada writ telah disampaikan diletakkan pada peguam-peguam responden/plaintif. Tiada apa-apa dikemukakan di sini untuk menunjukkan bahawa peguam-peguam responden/plaintif telah mengambil apa-apa langkah untuk mempersoal Mahkamah Tinggi Johor Bahru mengenai kemajuan penyerahan writ. Ia memang tidak boleh dipertikaikan bahawa ia adalah tanggungjawab peguam-peguam responden/plaintif untuk mengawasi kes mereka sendiri.

Legislation referred to:
Rules of the High Court 1980, O. 6 rr. 7(2), (2A)

For the appellant - Tho Kam Chew; M/s KC Tho & Partners
For the respondent - Adi Radlan Abd Rahman; M/s Adi Radlan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Sulong Matjeraie JCA:

[1] This is the judgment of the court.

[2] The appellant was the 6th defendant in a writ of summons and statement of claim filed by the respondent/plaintiff and was sued as a guarantor in respect of a Revolving Credit Facility of RM2,500,000 granted to the 1st defendant company known as Valiant Development Sdn Bhd ("Valiant"). The Revolving Credit Facility was secured, *inter alia*, by a charge of six parcels of land belonging to Valiant.

[3] The writ of summons was dated 25 February 2000 while the statement of claim was dated 24 February 2000.

[4] Service of the sealed copy of the writ was effected on Valiant and 4th, 5th and 7th defendants (qua guarantors). judgments in default of appearance were obtained against the first three defendants on 24 April 2000 and against the 7th defendant on 25 May 2000.

[5] The respondent/plaintiff then took steps to enforce those judgments, resulting in the following events:

(a) On 19 May 2002 the 4th and 5th defendants were adjudged bankrupts.

(b) On 10 January 2003 the 1st defendant was wound up.

(c) On 21 August 2003 the 7th defendant was adjudged bankrupt.

[6] Service of process on the 2nd and 3rd defendants as well as on the appellant took a little longer as they were all residents and citizens of Singapore. As such the respondent/plaintiff filed an *ex parte* summons-in-chambers on 25 February 2000 applying *inter alia* for leave and liberty to serve the writ of summons out of jurisdiction against the 2nd and 3rd defendants and against the appellant. This application was before the Registrar and it was allowed and an order was accordingly given on 24 April 2000.

Service Of Process Of Writ Of Summons Out Of Jurisdiction

[7] Service of process against the 2nd, 3rd defendants and the appellant were carried out in the following manner.

[8] The Johor Bahru High Court Registry wrote to the Chief Registrar of the Federal Court in Kuala Lumpur on 25 May 2000 forwarding among other things three sealed copies of the writ for service of process to be effected in Singapore.

[9] The Federal Court Registry on 24 June 2000 wrote to the Singapore Supreme Court Registry forwarding those documents and requesting that service of process be effected on all the 2nd, 3rd defendants and the appellant and that an affidavit of the process server be provided.

[10] The following month, the Singapore Supreme Court Registry replied on 11 July 2000 in a letter addressed to the Johor Bahru High Court and purportedly carbon copied to the respondent/plaintiff's lawyers informing that its process server's attempts at service on all the three foreign defendants proved unfruitful.

[11] Unfortunately it was submitted by the respondent that the following did not take place:

(i) The Johor Bahru High Court Registry failed to notify the respondent/plaintiff's lawyers of the failed attempts at service by the Singapore court;

(ii) The carbon copy of the letter of 11 July 2000 was not received by the respondent/plaintiff's lawyers;

(iii) The Federal Court was not given a reply by the Singapore Supreme Court Registry to its letter of 24 June 2000 and so failed to notify either the Johor Bahru High Court Registry or the respondent/plaintiff's lawyers of the unsuccessful attempts at service.

[12] It was contended by the respondent that all the above sub-paras. (i) to (iii) came to light only upon a file search conducted by the respondent/plaintiff's lawyers on 18 January 2006 who then proceeded to apply *via* summons for an order for extension of the validity of writ. This was allowed by the Registrar who handed down an *ex parte* order on 21 June 2006 renewing the writ by giving 11 extensions of six months each (extending the writ by five years and six months).

[13] Counsel for the respondent/plaintiff's submitted that this was a deliberate and considered exercise of discretion by the Registrar.

[14] Upon service of process thereafter being effected on the 2nd, 3rd defendants and the appellant, judgments in default of appearance against the 2nd and 3rd defendants were obtained on 29 August 2006. The appellant however responded by applying *via* summons on 17 July 2006, for *inter alia*:

(i) that the writ and statement of claim out of jurisdiction dated 15 March 2000 and the order by the Registrar dated 21 June 2006 be struck out with costs;

A (ii) that the service of process of writ and statement of claim against the appellant, the notice of writ and statement of claim out of jurisdiction on 15 March 2000 and the order dated 21 June 2000 be set aside with costs;

B (iii) that the writ and statement of claim against the appellant be struck out with costs.

[15] In dismissing the summons by the appellant, learned judicial commissioner emphatically held that the respondent/plaintiff's lawyers were kept in the dark from around 24 April 2000 onwards C as to the outcome of the attempted service of process on the three foreign defendants in Singapore. Further the learned judicial commissioner said that the respondent/plaintiff's lawyers' explanation for not applying for an order for extension of the validity of the writ at any time between 24 June 2000 and D 23 February 2006 was accepted by the learned Registrar who then went on to allow the application on 20 June 2006. Hence, it was the view of the learned judicial commissioner that there was no delay caused by the respondent/plaintiff and even if there were, it was unintentional. E

[16] The appellant therefore appealed against the said decision of the learned judicial commissioner.

[17] Issues Before The Court Of Appeal

F (a) Can the writ of summons be extended for a period of more than 12 months under the Rules of the High Court, 1980?

(b) Who is responsible to monitor if a writ of summons has lapsed or otherwise when such writ and statement of claim is to be G served out of jurisdiction?

[18] Issues (1) and (2) will be dealt with together. To determine issue (1) it is necessary to have sight of the Rules of the High Court 1980. For ease of reference the relevant provisions of O. 6 H r. 7 Rules of the High Court 1980 on the "duration and renewal of writ" is hereinafter appended *in extenso*.

> Rule 7(1): For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for 6 months, beginning with the date of its issue and a concurrent writ is valid I in the first instance for the period of validity of the original writ which is unexpired at the date of the concurrent writ.

Rule 7(2): Subject to paragraph (2A), where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions 5 times), not exceeding 6 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

Rule 7(2A): An application for renewal must be made before the expiry of the writ, *ex parte* by summons, supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

[19] Pursuant to O. 6 rr. 7(2) and 7(2A), it is clear that the High Court has the power to extend the validity of the writ of summons twice and not exceeding six months at any one time. The other requirement under r. 7(2) is that the application to extend must be made before the expiry of the writ of summons.

[20] In the instant case, the application to extend the validity of the writ of summons dated 25 February 2000 was made *vide* a summons-in-chambers dated 23 February 2006 ("renewal application"). It was two days short of six years from the date of the writ of summons. Yet the High Court at Johor Bahru allowed the writ of summons to be extended 11 times ie, from 25 February 2001 to 24 August 2006 *vide* an order dated 21 June 2006 ("extension order").

[21] It is obvious from a careful reading of O. 6 r. 7 of the Rules of the High Court 1980 that firstly the renewal application was not made "before the expiry of the writ". It was made on 23 February 2006 whereas the writ was dated 25 February 2000. This was contrary to O. 6 r. 7(2A) Rules of the High Court 1980. Previously a writ may be valid for a period of 12 months but after the amendment of the Rules of the High Court 1980 that came into effect from 22 September 2000 *vide* PU(A) 342/ 2000, a writ is only valid in the first instance for six months.

[22] Secondly, the extension order allowed an extension of 11 times whereas under O. 6 r. 7(2) Rules of the High Court 1980 the court could only order the extension of the validity of the writ twice not exceeding six months at any one time beginning with the day next following that on which it would otherwise expire. Clearly by extending 11 times the extension order ran foul of O. 6 r. 7(2) Rules of the High Court 1980.

[23] There is no merit in the argument that the respondent/plaintiff's lawyers were kept in the dark around 24 April 2000 onwards as to the outcome of the attempted service of process on the 2nd, 3rd defendants and the appellant. The responsibility to find out if the writ has been served laid with the respondent/plaintiff's lawyers. One of the simplest ways to do so is either to write a letter to the court or to make a search at the court Registry.

[24] Nothing was adduced to this court to show that the respondent/plaintiff's lawyers had taken any step to write to the High Court Johor Bahru enquiring on the progress of the service of the writ. There was no letter produced by the respondent/plaintiff's lawyers even to find out the latest development of the case. They even failed to make any search even during the life span of the writ.

[25] The first search was only made by the respondent/plaintiff's lawyers on 18 January 2006. This was almost six years after filing the writ. Such a lackadaisical attitude reflected dilatory unreasonableness on their part for which they were completely to blame. Why was there no search being made at the High Court at Johor Bahru registry any earlier? It is unquestionably the responsibility of the respondent/plaintiff's lawyers to monitor their own case. They could not shift the blame on the Registry of the Federal Court of Malaysia or even for that matter the Registry of the Supreme Court of Singapore or least of all the Registry of High Court at Johor Bahru for keeping them in the dark. This was so because the letter from the Registry of the Singapore Supreme Court which was addressed to the High Court at Johor Bahru was allegedly copied to the respondent/plaintiff's lawyers. The inference is that they would know the current development of the inability of their Singapore counterpart in effecting service.

[26] In this respect the respondent/plaintiff's lawyers could and should be able to enlighten themselves. It could not be gainsaid that they were aware of the date of expiry of their own writ as they filed the writ themselves. Consequently the date of its expiry was within their knowledge and contemplation.

[27] The validity of the writ could only be extended twice under the Rules of the High Court 1980. By those words, the court could not extend beyond two times. However unfettered might be its powers or however deliberate and considered the discretion might have been exercised, the High Court Johor Bahru had no valid authority to extend as it did the writ by 11 times spanning over a period of five years and six months. This was simply contrary to O. 6 r. 7(2) of the Rules of the High Court 1980.

[28] For the above reasons, this appeal is allowed with costs fixed at RM3,000. Deposit to be refunded to the appellant.